

inform the Board of such errors, the grower will not receive a diversion certificate.

[63 FR 33528, June 19, 1998, as amended at 64 FR 30232, June 7, 1999]

§ 930.159 Handler diversion.

(a) *Methods of diversion.* Handlers may divert cherries by redeeming grower diversion certificates, by destroying cherries at handlers' facilities (at-plant), by diverting cherry products accidentally destroyed, by donating cherries or cherry products to charitable organizations or by using cherries or cherry products for exempt purposes under § 930.162, including export to countries other than Canada, and Mexico. Once diversion has taken place, handlers will receive diversion certificates stating the weight of cherries diverted. Diversion credit may be used to fulfill any restricted percentage requirement in full or in part. Any information of a confidential and/or proprietary nature included in this application would be held in confidence pursuant to § 930.73 of the order.

(b) *Board notification and handler plan.* Any handler intending to divert cherries or cherry products pursuant to § 930.59 of the order (except through exempt uses under § 930.62 of the order) must notify the Board of such intent and provide a plan by November 1 which shows how the handler intends to meet the restricted percentage obligation, except that, for the 1997-98 season only, the deadline is February 5, 1998. The Board may extend this date in individual cases pursuant to a written request showing good cause why the plan cannot be provided by the due date. A handler will have one year to fulfill such plan. The details of the plan shall include, but not be limited to, the name and address of the handler, the total product processed at-plant, product diverted at-plant, in-orchard diversion certificates redeemed, anticipated donations to charitable outlets, disposition to exempt outlets or uses and detailed plans for how and where such disposition will be made, and inventory reserve amount. It shall also contain an agreement that the proposed diversion is to be carried out under the supervision of the Board and that the cost of such supervision is to be paid by

the handler. Supervision of diversion by means other than destruction of the cherries at a handler's facility will be subject to supervision as found necessary by the Board. USDA inspectors or Board employees will supervise diversion of cherry products at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42). Any cherries not diverted in accordance with the handler's plan will be placed into the secondary inventory reserve or the primary inventory reserve if a secondary inventory reserve has not been established.

(c) *At-plant diversion.* Diversion by disposal at-plant may take place prior to placing the cherries into the processing line, or after processing, but before a finished product is manufactured. Such diversion will take place under the supervision of USDA Inspection Service or Board employee inspectors. USDA inspectors or Board employees or Board agents will supervise diversion of cherry products at-plant at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42).

(d) *Diversion of finished products.* Handlers may be granted diversion credit for finished tart cherry products that are accidentally destroyed during the 1998-1999 crop year (July 1, 1998, through June 30, 1999), and thereafter. To receive diversion credit under this option the cherry products must be owned by the handler at the time of accidental destruction, be a marketable product at the time of processing, be included in the handler's end of the year handler plan, and have been assigned a Raw Product Equivalent (RPE) by the handler to determine the volume of cherries. In addition, the accidental destruction, and disposition of the product must be verified by either a USDA inspector or Board agent or employee who witnesses the disposition of the accidentally destroyed product. Products will be considered destroyed if they sustain damage which renders them unacceptable in normal market channels.

(e) *Contributions to approved charitable organizations.* When diverting by donating cherries or cherry products to charitable organizations, handlers should

follow the requirements specified herein. For contributions to qualify for diversion credit, the contributed product should be marked clearly "NOT FOR RESALE". The receiving organization must be approved by the Board as a qualified recipient of contributions of tart cherry products. Such organizations must be tax-exempt, must not sell the donated products and must be noncompetitive with other tart cherry industry sales outlets. Once products are donated to an organization, the Board must receive satisfactory documentation of the transaction. Handlers should provide the Board with information on how the product was used and the volume of product used.

(f) *Grower diversion certificates.* To satisfy restricted percentage obligations by redeeming grower diversion certificates handlers must present to the Board grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with the applicable rules and regulations governing the issuance of grower diversion certificates. For this crop year July 1, 1997, through June 30, 1998, grower diversion certificates will be valid until February 5, 1998.

[63 FR 404, Jan. 6, 1998, as amended at 63 FR 20019, Apr. 22, 1998; 64 FR 9268, Feb. 25, 1999; 64 FR 33009, June 21, 1999; 65 FR 35267, June 2, 2000; 69 FR 41385, July 9, 2004]

§ 930.162 Exemptions.

(a) *General.* Tart cherries which are used for the purpose of new product development, for new market development and market expansion, for the development of export markets, for experimental purposes, for export to countries other than Canada, and Mexico, or which are donated to charitable organizations may be granted an exemption by the Board and will be exempt from §§ 930.41, 930.44, 930.51, 930.53, and §§ 930.55 through 930.57, subject to the following terms and conditions. Any information received of a confidential and/or proprietary nature included in this application will be protected from disclosure pursuant to § 930.73 of the order.

(b) *Definitions.* The terms in paragraph (a) of this section shall have the following meaning:

(1) *New product development.* This term includes the development of new tart cherry products or of foods or other products in which tart cherries or tart cherry products are incorporated which are not presently being produced on a commercial basis. New product development can also include the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry; an end product of the processing of raw tart cherries done by the industry at pack time either for resale or for re-manufacturing which has not been manufactured previously by the industry; or a processed, value-added item that includes tart cherry products as an ingredient which has never been marketed to consumers either by a handler within the industry or by a food manufacturer. Once total industry utilization for a new product exceeds 2 percent of the five year average production of tart cherries, the product shall no longer be considered under development and not eligible for a new product development exemption. In addition, the maximum duration of any credit activity is three years from the first date of shipment.

(2) *New market development and market expansion.* This term includes the development of markets for tart cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry (including the development of new export markets): *Provided*, That these markets are a geographic area into which tart cherries or products derived from them have not previously been sold. The term "market expansion", includes activities that incrementally expand the sale of either tart cherries or the products in which tart cherries are an ingredient, such as, but not be limited to: Expansions of the geographic areas into which tart cherries or tart cherry products are marketed; product line extensions; significant improvements to or revisions of existing